Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1984

JACKSON P. BERRY,

Petitioner

v.

J. GLENN BAILEY,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

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Respondent, J. Glenn Bailey, hereby responds to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

QUESTION PRESENTED

Respondent restates the question presented as follows:

DOES THE FIRST AMENDMENT PROTECT

AN APPOINTED DEPUTY SHERIFF FROM DISCHARGE FOR PERFORMING LAW ENFORCEMENT DUTIES ACCORDING TO HIS OWN METHODS AND PROCEDURES CONTRARY TO THE LAWFUL INSTRUCTIONS OF THE ELECTED SHERIFF.

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STATEMENT OF THE CASE

Though the evidence in this cause was conflicting, Respondent accepts Petitioner's Statement of the Case with the following exceptions and additions:

Petitioner has included extensive discussion regarding former Circuit Judge Sam Smith which Respondent contends is unwarranted and irrelevant to the issues in this cause and is further a gross misstatement of the Record. The quotation appearing at Page 4 of the Petition was not attributed to Judge Smith nor does there exist in the record any evidence of Judge Smith's political enemies being subjected to harassing investigations or any illegal activity by Judge Smith, or illegal activity which he ignored while holding judicial office. Respondent contends that these allegations are made in an attempt to invoke a prejudice against J. Glenn Bailey unwarranted by the

evidence and unnecessary for a disposition of this matter.

Respondent would supplement the Statement of the Case by referring to the testimony of Circuit Judge L. Arthur Lawrence, who at the time of the incident involving Jackson P. Berry, was the State Attorney for the Third Judicial Circuit of Florida. After the disturbance at the local restaurant which ultimately resulted in the discharge of Jackson P. Berry, State Attorney Lawrence undertook an independent investigation of the incident at the request of Sheriff Bailey. Mr. Lawrence's investigation revealed that no criminal prosecutions were warranted and hence charges against Judge Smith's daughter were dismissed. Mr. Lawrence testified that under Florida law it is not within the power of the Sheriff or Deputy Sheriff to dismiss charges against an accused individual once such charges have

been made. Sheriff Bailey at no time made such a request upon Mr. Lawrence.

As recognized by the District Court, the parties agreed prior to trial that there was no violation of any due process rights to which Jackson P. Berry may have been entitled. Mr. Berry further narrowed the alleged First Amendment rights to the specific use of the words "You are under arrest" and conduct in effectuating the arrest of several individuals in the restaurant incident.

SUMMARY OF ARGUMENT

As found by the District Court and the Eleventh Circuit Court of Appeals, Mr. Berry was discharged for failing to perform his law enforcement duties as directed by Sheriff Bailey. The act of performing law enforcement by an appointed Deputy Sheriff in a manner as determined by the Deputy Sheriff is not a right

rising to the level of constitutional protection. There existed no speech or action on the part of Jackson P. Berry which was protected by the First Amendment of the Constitution of the United States giving rise to a cause under 42 U.S.C. 1983.

ARGUMENT IN OPPOSITION OF WRIT

As recognized by the District Court and Eleventh Circuit Court of Appeals, Mr. Berry was fired for allegedly "doing a good job" as he saw fit. Mr. Berry's actions and speech as an appointed Deputy Sheriff are alleged to be constitutionally protected under the First Amendment. Respondent respectfully submits that Mr. Berry's performance of his duties as a Deputy Sheriff under the factual situation that exists in this case is not constitutionally protected and that this Court should deny this Petition as

there are no issues requiring resolution by this Court.

Petitioner predicates his request for certiorari by claiming conflict with four cases of this Court. Pickering v. Board of Education, 391 U.S. 563 (1968); Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980) and Connick v. Myers, ___U.S. _____, 75 L.ed. 2d 708 (1983). The decision of the Eleventh Circuit does not infringe upon the reasoning, intent, or ultimate rule of law expressed in the above cases. Each of the above cited cases deal with a speech or action clearly protected by the First Amendment.

Elrod and Branti both involve the discharge of government employees for the sole reason that they were not affiliated with or sponsored by the political party of their employer. The right to political party affiliation is clearly a protected

right under the First Amendment.

Pickering involved the dismissal of a school teacher for expressing her critical views of the Board of Education to a local newspaper. The right to publicly criticize government is the most fundamental protection afforded by the First Amendment.

Connick involved the circulation of a questionnaire concerning interoffice matters by a plaintiff employed as an assistant district attorney. Plaintiff's firing was upheld in that the questionnaire did not contain speech sufficiently protected by the First Amendment to allow the disruption of the governmental agency with which she was employed. Contrary to Petitioner's assertions, Connick constitutionally allows dismissal of a government employee for failing to perform a lawful task within the scope of the employee's duties.

The speech and actions of Jackson P. Berry are of an entirely different nature. His discharge is not the result of political patronage nor did it result from the expression of his critical views of the Sheriff's Department. Mr. Berry alleges that the First Amendment allows him to perform his law enforcement duties in any manner and method which he deems to be correct, and according to his own personal beliefs. Quite to the contrary, Deputy Sheriffs are afforded their powers pursuant to specific Florida Statutes. Florida Statute 30.07 (1979) provides that Sheriffs may appoint deputies to act under them and who shall have the same power as the Sheriff appointing them and who for the neglect and default of whom in the execution of their office the Sheriff is responsible. The power to appoint or discharge deputies is reserved exclusively to the Sheriff by Florida Statute 30.53

(1979). Under Florida law, a Sheriff therefore does not employ deputies rather he appoints them.

Jackson P. Berry is free to believe in any method of law enforcement or ideological principle which he chooses. It is not Mr. Berry's power to enforce the law as he sees it, which was removed by virtue of his termination. Mr. Berry was and is free to utilize the constitutionally protected avenue of expressing his beliefs and criticisms of the Sheriff's Department, i.e. newspapers, speech, etc. He is not however constitutionally entitled to follow his own beliefs and instincts in the performance of his duties as a Deputy Sheriff. In those activities, he must yield to the lawful orders and requirements of his employer, Sheriff Bailey.

Respondent respectfully submits

that the opinion of the Eleventh Circuit does not contravene the spirit, intent, or holdings of the above opinions of this Court and that no interest of vital importance or public concern arise in this cause which need resolution by the Supreme Court.

CONCLUSION

Respondent respectfully suggests that the Petition for Certiorari be denied for the reasons stated above.

Respectfully submitted,

AVERA, BERNSTEIN & PERRY

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Samuel S. Jacobson, Esquire, Attorney for Petitioner, 2902 Independent Square, Jacksonville, FL 32202, by U.S. Mail, this 25th day of February, 1985.

William N. Avera
Attorney